No. 86-71

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CTS CORPORATION,

Appellant,

v.

DYNAMICS CORPORATION OF AMERICA,

Appellee.

On Appeal From The
United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF OF APPELLANT CTS CORPORATION

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Rule 28.1 Listing: The required information was provided in the jurisdictional statement of Appellant CTS Corporation at 1 n.1, and remains accurate.

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It is undisputed that the Indiana Control Share Acquisitions Chapter, in limiting the transferability of voting rights of potentially controlling corporate shares, neither (1) discriminates between interstate and intrastate commerce, nor (2) poses any threat of multiple or inconsistent burdens being placed upon commerce by the laws of different States. Appellee Dynamics Corporation of America ("DCA") therefore attacks the Chapter by firing a scattershot of Commerce Clause "theories," based on selectively quoted, out-of-context generalizations from opinions of this Court, factual assertions unsupported by any evidence, and economic and policy arguments having everything to do with legislative wisdom and nothing to do with constitutional jurisprudence.

In marked and significant contrast, the Brief for the Securities and Exchange Commission and the United States as Amici Curiae (the "U.S. Brief") takes a more balanced, reasoned approach that repudiates most of the erroneous reasoning of the Seventh Circuit, the District Court and DCA -- including any claim of Williams Act preemption. The United States nonetheless urges this Court to draw an ephemeral Commerce Clause line that would strike down the Indiana statute but leave intact a host of similar State laws that can also affect the desirability or outcome of a hostile takeover attempt. The United States' scholarly but finally unpersuasive argument demonstrates, however, that there is no constitutionally meaningful distinction between the Control Share Chapter and these other, concededly

constitutional State statutes. At bottom, the United States (no less than DCA) is inviting this Court to embark on the judicially inappropriate task of developing, under the aegis of the "dormant" Commerce Clause, a Federalized law of corporations.

I. There Is No Constitutional Distinction Between the Indiana Statute and Other State Laws That Also Regulate Internal Corporate Affairs and Also Affect Hostile Takeovers.

Appellant CTS Corporation ("CTS") submits as self-evident that a distinction of constitutional magnitude -- a rule that forbids discretionary choices otherwise available to the legislative branches of our State or Federal Governments -- should be capable of articulation in terms of the fundamental values of the constitutional provision invoked. The most telling feature of the DCA and U.S. Briefs is that each fails to demonstrate any

meaningful constitutional distinction, in terms of the values of the Commerce Clause, between the Indiana Control Share Chapter and a variety of other State statutes that may also adversely affect hostile takeovers but concededly raise no Commerce Clause issue. The reason for that failure is simple: No such distinction exists.

The United States disputes none of the major premises of the arguments of CTS and Indiana in support of the Chapter. It forthrightly agrees that State law is the source of whatever rights are associated with a share of corporate stock, and that the "Commerce Clause does not require a state to define in any particular way the bundle of rights that will be put into interstate commerce as corporate shares." U.S. Brief at 16 n.15. It agrees that a State's exercise of that power

> . . . does not offend the Commerce Clause, notwithstanding the obvious effects of the state's actions on the value and transferability of shares of the corporations its charters, because the chartering state is responsible for the very existence of the corporation and its shares, and it may define the latter as it wishes notwithstanding effects on their transferability.

Id. at 9-10.

The United States further recognizes that

> . . . having defined the rights of shareholders, a chartering state has an important and legitimate interest in protecting those rights with respect to all shareholders, resident and nonresident alike.

Id. at 22. Thus, unlike DCA, the United States does not tilt at the obvious fact that a State's corporation law per force "affects" -- i.e., defines, protects and regulates -- the rights of nonresident investors who purchase stock in that State's corporations, and hence per force has "extraterritorial effects" that raise no Commerce Clause concern:

> A nonresident who buys shares in an Indiana corporation accepts that state's definition of his rights and buys that state's protection.
>
> A chartering state's governance of the internal affairs of its corporations, including its definition of the rights of shareholders, obviously affects interstate commerce. Indeed, whenever the corporation then sells shares in interstate commerce, the chartering state may be said to be projecting its law beyond its borders.

Id. at 22-23 (footnotes and citations omitted).

Unlike the Seventh Circuit, the United States labors under no false belief that State laws that may make hostile takeovers less likely are for that reason constitutionally suspect. Compare U.S. Brief at 16 n.15, 23 n.24 with Seventh Circuit Opinion, CTS App. at A26 (state statute is "highly vulnerable if it impedes the important commerce in corporate control"). Hence, the United States necessarily agrees that any number of State laws

may affect the desirability or outcome of a hostile takeover attempt but raise no Commerce Clause issue whatever. See U.S. Brief at 23 n.24 (e.g., cumulative voting provisions; staggered terms for directors; restrictions on freeze-out or back-end mergers). Even DCA seems to agree that State laws of this sort are not constitutionally infirm. See DCA Brief at 23.

Finally, the United States recognizes that the voting rights of corporate shares -- the focus of the Control Share Chapter -- are also derived solely from State law. Thus, it specifically agrees that the "chartering state may define, create, and limit voting rights in ways that affect the attractiveness of shares without triggering any question under the Commerce Clause," and that "a share of stock has no inherent rights except

those that state law and the relevant corporate documents give it." U.S. Brief at 16 n.15. DCA and other amici misunderstand this point entirely, repeatedly emphasizing how "basic" and "essential" voting rights are to a share of stock. But, as the United States properly observes, the Commerce Clause imposes no constitutional "one share, one vote" rule on the States. Quaint metaphors -- a car without an engine, or a house without a roof -- cannot refute the point that a share of stock in a corporation has only those rights granted by State law.

The Indiana Chapter is, of course, just such a State law, "defin[ing] in [a] particular way the bundle of rights" reflected by a share of stock -- in a State-created corporation -- whether that share is thereafter "put into interstate commerce" or not. The

owner of that share (resident or non-resident) owns, inter alia, a proportionate share of the corporation's assets and earnings -- the first "stick" in the "bundle." Under Indiana law (and not Constitutional compulsion) the shareholder also owns, as a second "stick" in the "bundle," the right freely to transfer that "first stick" to another person. Indiana law also gives that shareholder certain voting rights in governing the corporation -- a third "stick" in the "bundle." But Indiana law further provides that the fourth "stick" in the "bundle" -- i.e., the power to transfer that voting power, whether to an in-State or out-of-State purchaser -- is not unlimited. Instead, the Control Share Chapter conditions the transferability of that "third stick" (voting power) to a potentially dominant shareholder on a

majority vote of the disinterested shareholders.

Despite its recognition of the fundamental authority of the States to create and define the voting and other rights of corporate shares, the United States nonetheless claims that the definition of voting transfer rights adopted by the Indiana statute distinguishes it from the range of other, concededly constitutional State laws. The United States reasons that the Chapter is constitutionally defective because (1) its provisions on voting rights are triggered by a purchase and sale "transaction" involving the shares; (2) although the Chapter does not discriminate between in-State and out-of-State "transactions," most (but by no means all) such transactions would take place in interstate commerce; and (3) the Chapter's "effect is

to tend to preserve whatever pattern of voting rights (and, consequently, share ownership) exists in a given corporation at a given time against transactions that would alter the pattern." See U.S. Brief at 10, 16, 19, 26, 28. The United States claims the Chapter therefore violates the Commerce Clause because, "[w]hen a share of stock defined under Indiana law to represent certain rights has lawfully entered the national marketplace in securities, Indiana may not, under the Commerce Clause, directly restrain its further transfer in the absence of a substantial state interest." Id. at 19.

Putting aside the lack of evidence on the factual links in this chain of reasoning, this formalistic focus on what triggers the Chapter ignores that "transferability" is itself one of the characteristics of a share's rights

that must be defined and regulated by State law -- as this Court has recognized in upholding a chartering State's taxation of out-of-State transfers of shares in its corporations:

> Suffice it to say that if that freedom of transfer [of Utah corporate stock] exists as respondents claim, it stems from Utah law. It finds its ultimate source in the authority which Utah has granted. It is indeed a benefit which Utah has bestowed. For it alone Utah may constitutionally ask a return.

State Tax Commission v. Aldrich, 316 U.S. 174, 180 (1942). See also Louisville & Nashville R.R. v. Kentucky, 161 U.S. 677, 702-03 (1896) (upholding State prohibition on railroad's purchase in interstate commerce of stock of competing railroad). If Indiana may tax an out-of-State transfer of the shares of its corporations, or even prohibit such transfers altogether (assuming it does not discriminate between in-State and out-of-State

transactions), then surely it may define (as it has in the Control Share Chapter) the terms under which voting rights in its domestic corporations may be transferred.

Partnership law, another area of property interests exclusively created and regulated by the States, illustrates Indiana's constitutional authority to regulate the transferability of voting rights in its domestic corporations. In the Control Share Chapter, Indiana has altered the (currently) conventional definition of corporate share rights by providing that, while the underlying interest in the corporation's assets and profits remains freely transferable, the voting right might not be transferable in a control share transaction. This differing treatment of equity interests and voting rights is no novelty -- it is

well established in the law of partnerships. While a partner may normally transfer his interest in partnership property and income, he usually may not transfer his partnership vote without the consent of other partners.[1] Such restrictions on transfer of partnership voting rights surely raise no constitutional question, whether or not the units are sold publicly and in interstate commerce. Nor can there be any meaningful constitutional distinction between partnerships and corporations. It follows that nothing in the Commerce Clause bars Indiana from restricting the transfer of voting rights in shares of corporate stock as well.

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[1]See UNIFORM PARTNERSHIP ACT § 27, 6 U.L.A. 353 (1969); REV. UNIFORM LTD. PARTNERSHIP ACT §§ 702, 704, 6 U.L.A. 259-61 (Supp. 1986).

The United States' claim that the Indiana Chapter is constitutionally impermissible because it is triggered by a "transaction" is inconsistent not only with its views on the general authority of the States over corporation law, but also with the specific example of State regulation it offers as a permissible alternative to the Chapter. The United States correctly observes that Indiana could constitutionally create corporations in which no person "may own more than 20% of the voting shares." U.S. Brief at 9. But no principled Commerce Clause distinction exists that can uphold such a law and strike down the Control Share Chapter. Under the United States' "no more than 20%" statute, the same interstate (or intrastate) "transaction" that triggers the Chapter would trigger the same loss of voting rights

whenever the share is sold to a person who already owns 20%. Moreover, the United States' "no more than 20%" statute would obviously have much the same effects in "tend[ing] to preserve whatever pattern of voting rights (and, consequently, share ownership) exists in a given corporation at a given time against transactions that would alter the pattern." Thus, the hypothetical statute the United States says is constitutional would be triggered by precisely the same "transactions" that trigger the Control Share Chapter, and would have precisely the same kind of "effects" -- the very facts that the United States says are the distinguishing features rendering the Chapter unconstitutional.

The Indiana statute is in fact far less restrictive on "transferability" in interstate (and intrastate) commerce

than the "no more than 20%" State law defended by the United States as constitutionally permissible. Rather than crudely prohibiting a transfer of voting rights that most shareholders may prefer, the Chapter allows the transfer to take place with the approval of disinterested shareholders -- the very shareholders the United States agrees "have a genuine interest in that transaction." U.S. Brief at 27. If, as the United States points out, the more restrictive statute is constitutional, then the Control Share Chapter simply must be valid as well.

The Chapter is but a nondiscriminatory exercise of Indiana's conceded power to define the property rights, including voting rights, of Indiana corporate shares. The fact that purchases and sales of shares (some or

even most of which may occur in interstate commerce) may trigger application of the Chapter is of no constitutional significance, any more than the fact that such transactions may trigger application of State laws governing mergers, share exchanges or a variety of other matters. Nothing in the Constitution requires that either an equity or voting interest in a corporation, jointly or separately, be freely transferable. In short, the Commerce Clause imposes no Platonic ideal of corporation law on the States, much less one in which all shares must have one vote and all shares and voting rights may be freely bought and sold.[2]

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[2]The United States suggests just such a Platonic ideal (and consequent Federalization) of corporation law in claiming that "a state may not confer on shareholders a right that, inherently, is not a power to govern the

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II. State Authority Over Corporation Law Is Not Limited by the Familiar Functioning of Any "National Market" for Corporate Securities.

Conceding (as they must) that the Control Share Chapter does not facially discriminate against interstate commerce or out-of-State residents, DCA and some _amici_ urging affirmance contend that the Chapter nonetheless violates the Commerce Clause because it "disrupts" or "interferes with" an inherently "national" market for

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corporation but a right to restrain interstate commerce." U.S. Brief at 12. By what standard _other_ than some idealized Federal corporation law can it be said that giving shareholders a say in the accession to power of a single dominant shareholder is not, "_inherently_," a "power to govern the corporation"? Certainly not State law standards, as the Control Share Chapter proves. _See also_ _Providence & Worcester Co. v. Baker_, 378 A.2d 121 (Del. 1977) (Delaware corporation law allows voting system in which increasing share holdings have proportionally less voting power).

corporate securities, and has a "disparate impact" on out-of-State takeover bidders. See DCA Brief at 15; Amicus Curiae Brief of the Securities Industry Association, Inc. at 3, 25. Certain strains of that theme are echoed by the United States as well. See U.S. Brief at 18, 28.

All these arguments ignore that the market for corporate securities -- however "national" its scope, and however familiar its current functioning may be -- rests entirely on property rights created and defined solely by State corporation law. In essence, DCA and supporting amici contend that, because the States have in the past generally defined share rights in ways that are now familiar, and because a familiar national market for those share rights has developed, the States are now prohibited by the "dormant"

Commerce Clause from redefining the share rights created by State laws in ways that might "disrupt" the present functioning of that market. Nothing in this Court's Commerce Clause jurisprudence supports any such contention; and this Court has rejected analytically indistinguishable claims even in the context of economic interests that, unlike the corporate share rights involved here, do not owe their very existence to the States' own laws.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), in which the Court rebuffed a Commerce Clause challenge to a Maryland law that prohibited petroleum producers and refiners from operating retail service stations, is both instructive and controlling. Although the burden of the facially nondiscriminatory Maryland law -- requiring divestment of retail stations -- fell

solely on out-of-State companies, the Court held that the statute did not violate the Commerce Clause:

> The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.

437 U.S. at 126. Moreover, the Exxon Court expressly rejected the "novel suggestion" that "because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas." Id. at 128. By no meaningful standard could the market for corporate securities, let alone the portion of that market involving hostile takeover bids, be said to be more "inherently national" than the market in this Nation for gasoline.

The Court rejected similar claims in Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), which involved a

State-imposed severance tax on coal mined in the State. Some 90% of the coal was then shipped to other States, and the severance tax was passed on to out-of-State utilities and their customers. The Court rejected the claim that the tax discriminated against interstate commerce because the burden was borne primarily by nonresidents, emphasizing that "the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers." 453 U.S. at 619.

Acceptance of DCA's "national market" and "disparate impact" theories would overturn Exxon and Commonwealth Edison, pronounce an unprecedented constitutional doctrine, and launch the courts on the mission of "Federalizing" large additional portions of the economic activity of the Nation -- not

pursuant to Congressional legislation, but rather through the "constitutionalizing," under the Commerce Clause, of the structure and operation of particular markets. Any nondiscriminatory State law would be constitutionally suspect whenever an out-of-State resident could claim that it "interfered" with the past functioning of an interstate market, or that the burden of State regulation, gauged by some nebulous standard of "fairness" that balances apples against oranges, fell "disproportionately" on nonresidents.

As CTS has pointed out, a majority of the members of this Court have repeatedly said that, absent the threat of conflicting and inconsistent burdens imposed by different State laws, the Court will not engage in obviously legislative "balancing" tasks of this sort -- such as "weighing" the "amount"

of safety accomplished by a State highway regulation against the "amount" of burden on interstate commerce. See CTS Brief at 35-37 & n.18. Nothing in those opinions or in any of this Court's Commerce Clause precedents suggests that the Federal courts may reverse that principle and engage in such legislative balancing when it is claimed that the safety benefits are enjoyed "disproportionately" by State residents, and the accompanying commerce burdens are borne "disproportionately" by out-of-State residents.[3]

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[3]This Court's Commerce Clause decisions also provide no support for DCA's related contention that the Indiana statute impermissibly "protects" incumbent management of Indiana corporations from tender offerors, most of whom (DCA asserts) will be out-of-State residents. Even if there were evidence to support the factual premises of this claim, that is not the type of protectionism between States that the Commerce Clause forbids. To

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At bottom, these "national market" and "disparate impact" claims reflect a profound misunderstanding of Exxon, Commonwealth Edison and this Court's other Commerce Clause cases. As those cases teach, the Commerce Clause is not intended to preserve the allegedly "natural" functioning of particular markets, nor to ensure that the burden of State regulation falls in equal measure on residents and nonresidents. Rather, the Commerce Clause reflects a

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whatever degree the Chapter supposedly "protects" management, it "protects" it from all hostile takeovers, not only those made by nonresidents. That is not interstate protectionism any more than was Maryland's desire in Exxon to "protect" independent service station operators from refiners. To hold otherwise would mean that whenever a State law favored one group of economic actors over another, and the less favored group contained a higher proportion of nonresidents, the State's "protection" of the favored group would violate the Commerce Clause. That has never been the law.

theory of political and economic union, under which the States are not required to further any particular economic theory, but are prohibited only from discriminating against sister States and their residents, and from burdening interstate commerce with conflicting and overlapping State regulations.[4]

Neither danger is presented by the Control Share Chapter, which is nondiscriminatory and applies only to Indiana corporations. Whatever the Chapter's "impact" on the market for Indiana

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[4]The United States rejects this view of the Commerce Clause based on Freeman v. Hewitt, 329 U.S. 249 (1949), which struck down Indiana's gross income tax as applied to out-of-State securities transactions by Indiana residents. U.S. Brief at 18 n.18. In Freeman, however, the threat of multiple State taxation of the same transactions was central to the decision, see 329 U.S. at 256-57, as the Court recognized in Armco Inc. v. Hardesty, 467 U.S. 638, 644-45 & n.8 (1984).

corporate shares, that impact threatens no Commerce Clause principle -- any more than did the impact of Maryland's regulation of petroleum products in Exxon or Montana's tax on coal in Commonwealth Edison. Moreover, the lesson of those cases is particularly compelling here, since -- unlike the claimed "inherently national" market for petroleum or coal -- the "national market for corporate control" exists at all only because the States, acting under no Commerce Clause or other constitutional compulsion, have created corporations and have thereby defined the bundle of corporate rights and interests that are available for sale in the first instance.

III. There Is Also No Constitutional Distinction Between the Control Share Chapter, Which Permits Corporations to "Opt-Out" of the Statute, and a State Law Allowing Corporations to Adopt the Same Rules in a Corporate Charter.

CTS and amici urging reversal have pointed out that the Control Share Chapter merely establishes the terms of a private contract between an Indiana corporation and its shareholders, and among the shareholders inter sese, with respect to voting rights in that corporation -- especially since IND. CODE § 23-1-42-5 allows Indiana corporations to "opt-out" of the Chapter. CTS Brief at 43 n.22; Joint Brief of the Indiana Chamber of Commerce and Indiana Legal Foundation, Inc. as Amici Curiae at 12-16. There is no substantive difference between the Chapter (which corporations may elect not to follow) and an otherwise identical statute that would authorize a corpora-

tion to adopt the Chapter's definition of voting rights as a charter provision; yet any private corporate action under the latter statute would be subject to no Commerce Clause scrutiny whatever. Despite the remarkable variety of Commerce Clause theories advanced by DCA and various amici urging affirmance, none has even attempted to respond to this point.

This Court has never held that the Commerce Clause restricts private activity, whatever the "impact" of that activity on interstate commerce. Other courts have expressly rejected the notion that action by corporate directors can violate the Commerce Clause, even though that action is authorized (as it must be) by State corporation law. Indeed, the Seventh Circuit has rejected as "frivolous" DCA's argument that Indiana law violated the Commerce

Clause by allowing CTS's board of directors to adopt a shareholder rights plan: "The commerce clause does not require states to outlaw private contracts that may impede interstate commerce." Dynamics Corp. of America v. CTS Corp., 805 F.2d 705, 718 (7th Cir. 1986). Accord, Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1, 4-5 (2d Cir. 1983), cert. denied, 465 U.S. 1052 (1984); Moran v. Household Int'l, Inc., 500 A.2d 1346, 1353 (Del. 1985) (fact that directors "act pursuant to a state statute provides an insufficient nexus to the state for there to be state action which may violate the Commerce Clause").[5]

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[5]These decisions comport fully with this Court's repeated holdings that private acts authorized by State law do not constitute "State action" for Fourteenth Amendment purposes unless the statute orders the private

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In substance, the Indiana statute simply permits Indiana corporations to adopt or reject charter provisions governing the voting rights of shares. Had the Chapter been formally structured as an authorizing provision allowing its adoption by corporate election, it is plain that neither the authorization itself nor the act of corporate adoption would raise any Commerce Clause or other constitutional issue. It trivializes constitutional analysis to suggest that the result should differ simply because the Chapter, rather than requiring an affirmative "opt-in," states that its optional provisions governing voting

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acts. E.g., Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164-65 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).

rights will apply unless an Indiana corporation "opts-out."

IV. The Indiana Statute is a Rational Exercise of State Legislative Power, Protecting the Legitimate Interests of Non-Dominant Shareholders in Indiana Corporations.

DCA and the United States also contend that the Control Share Chapter is not a "legitimate" exercise of Indiana's conceded power to govern the internal affairs of Indiana corporations. DCA's arguments on this point require no prolonged attention. In essence, what emerges from its tangle of unsupported factual assertions, economic policy arguments and out-of-context Commerce Clause cases is that DCA thoroughly disapproves of the Chapter and thinks that the Indiana legislature made a profound mistake in striking the balance among the competing interests involved. What does not emerge is any meaningful or even

coherent Commerce Clause theory under which DCA's negative views about the Chapter, which might properly be shared with the Congress or the Indiana legislature, render it invalid as a matter of constitutional law.

The United States, in this as in the other portions of its argument, takes a more reasoned approach that candidly acknowledges State power in this area. It agrees that Indiana has

> . . . a legitimate and substantial interest in governing the "internal affairs" of its corporations, including the rights of shareholders vis-à-vis the corporation itself, its directors and officers, and fellow shareholders.

U.S. Brief at 22. It further agrees that the State may (indeed, must) project these aspects of its corporation laws to nonresident shareholders and others who choose to deal with the corporation, id. at 22-24, and that the State may regulate internal corporate

affairs in ways that may promote or restrict hostile takeovers, id. at 24-25. Finally, the United States observes that "Indiana is quite correct that other shareholders may have a genuine interest in [a] transaction" that creates or transfers a substantial block of control shares. Id. at 27.

The United States then advances, however, an arbitrary limit to this conceded State authority, and argues that the Control Share Chapter falls outside it. The proposed boundary is that mergers, acquisitions, and "other 'fundamental changes' that generally require shareholder approval are changes in the very structure of the corporation," id. at 25 & n.28, whereas tender offers involve only shareholders and third parties, id. at 25-26.

This distinction -- also advanced in DCA's Brief at 27-28 -- ignores the practical consequences of a control share transaction. Furthermore, the distinction has no basis in any source of Federal law, let alone the Commerce Clause. As a practical matter, a control share transaction obviously affects "the rights of shareholders vis-à-vis . . . fellow shareholders," thereby squarely fitting the United States' own definition of "internal affairs." U.S. Brief at 22. Far more important, however, is that State corporation law -- and only State corporation law -- determines which corporate transactions or events are sufficiently "fundamental" that shareholder approval should be required.

Short of a decision by Congress to "Federalize" corporation law -- a step it has consistently refused to take --

the States are the only arbiters in our Federal system of the rules of corporate governance, including the rules governing share voting rights and which matters are sufficiently "fundamental" to require a shareholder vote. Whatever academic views the United States, DCA, CTS or even this Court may have on whether a given corporate transaction "should" be submitted to shareholders in a "model" corporation statute, the Commerce Clause does not impose any ideal form of corporation law upon Indiana and its sister States. The United States and DCA offer no explanation whatever of how their view of what constitutes a "fundamental" corporate event can be derived from the Commerce Clause.

Protecting small shareholders from coercive takeover tactics and potential abuses by dominant shareholders estab-

lishes a rational basis for the Indiana legislature's judgment in enacting the Control Share Chapter -- namely, that the practical consequences of control share transactions for other shareholders are so important and "fundamental" that they should be allowed to vote on a proposed change in voting control. See CTS Brief at 25-26, 37-39; Indiana Brief at 88-89. CTS does not claim that Indiana's views on these issues reflect the only possible or reasonable conclusion; but CTS, unlike DCA and the United States, is not contending (and need not persuade this Court) that Indiana's is the only conclusion permitted by the United States Constitution. CTS's contentions are far more modest, but no less dispositive: The Indiana legislature's judgment is rationally supportable; and whoever may have the better of the

economic and other policy debates about the wisdom of that judgment, our constitutional system of Federalism establishes that the judgment was Indiana's to make.

V. The United States and the SEC Have Shown That the Indiana Statute Is Not Preempted by the Williams Act.

The United States and the Securities and Exchange Commission (the "SEC") give short shrift to DCA's claims that the Control Share Chapter is preempted by the Williams Act, effectively undermining any plausible basis for maintaining that contention. The SEC, the Federal agency responsible for administering and enforcing the supposedly conflicting Federal statute, agrees that there is no conflict between the provisions of the State and Federal laws, and that the Indiana Chapter violates no preemptive Federal statutory policy. Neither DCA nor other

amici urging affirmance have pointed to any conflict in the statutory provisions, and their asserted conflict with Federal "policy" is disavowed by the Federal Government itself.[6]

The SEC may claim that it has the authority, under the Williams Act, to promulgate regulations that would preempt the Control Share Chapter. Regardless whether such a claim would be correct, it conclusively demonstrates that the Chapter is not now preempted. If the Williams Act does not give the SEC authority to promulgate regulations that would override the substantive provisions of the Indiana statute -- an issue that this Court need not decide -- then the Chapter cannot be preempted by the Williams Act. If, on the other hand, the SEC does have has such authority but has declined to exercise it, then the Chapter has not been preempted. In either event it is plain, as the United States and the SEC agree, that DCA's preemption claim in this case is meritless.

[6]The futility of DCA's preemption claim is underscored by the fact that the source of the Federal 20 business day minimum waiting period for tender offers -- the centerpiece of DCA's efforts to posit a "conflict" with the Control Share Chapter -- is not the Williams Act itself but a regulation promulgated by the SEC. 17 C.F.R. § 240.14e-1(a) (1986). The SEC, however, has advised the Court that there is no conflict between its regulation and the Indiana statute.

VI. Conclusion.

Though DCA and the United States both contend that the Control Share Chapter is somehow outside the constitutional pale, neither can articulate any meaningful constitutional theory as to why this should be so.

Plainly, Indiana has, in enacting the Chapter, exercised its power to define and regulate corporate voting rights in a way that differs from the pattern followed by most States, at least in recent decades. Plainly too, DCA is outraged and the United States is somewhat troubled by this departure from what each apparently considers the "norm" of "modern" corporation law. But "modern" corporation law, including such features as "one share, one vote" and freely transferable equity and voting interests, is itself a fairly recent phenomenon in our Nation's history. What is far more important, in terms of the issue presented to this Court, is that the Commerce Clause does not engraft these or any other features of State corporation law into the Federal Constitution -- regardless how "natural" such features may now seem to

DCA or anyone else; regardless whether a familiar "national market" may have developed in corporate shares as previously defined by Indiana or its sister States; and regardless whether the legislative judgment embodied in Indiana's departure from those previous definitions reflects a "wise" or even a "good" resolution of any underlying economic and other policy debates.

The Commerce Clause simply does not establish any substantive norms of corporation law that limit the States in enacting nondiscriminatory laws like the Control Share Chapter. In holding the Chapter invalid, the Seventh Circuit read its own economic and corporate governance theories into the "dormant" Commerce Clause -- just as it read into the Williams Act its own views of proper "neutrality" in take-over contests. The United States

properly disclaims the lower court's preemption reasoning, and offers a less sweeping set of corporate governance ideals to which it claims the States must constitutionally adhere. In substance and effect, however, the United States is asking this Court to do, albeit on a more limited scale, precisely what the Seventh Circuit did -- Federalize State corporation law.

The judgment below should be reversed.

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